UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ST. LOUIS CARDINALS, LLC

Case 14-CA-213219

and

JOE BELL, an Individual

RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

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SUBJECT INDEX

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

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INTRODUCTION

Respondent St. Louis Cardinals, LLC ("Respondent" or "Cardinals"), by its undersigned counsel and pursuant to Rule 102.46 of the Board's Rules and Regulations, respectfully submits this brief in support of its contemporaneously-filed Exceptions to the October 17, 2018 Decision of Administrative Law Judge ("ALJ") Arthur A. Amchan.[1]

The ALJ erred in rejecting Respondent's position that Charging Parties Thomas Maxwell, James Maxwell, Eugene Kramer ("Kramer"), and Joe Bell ("Bell") (collectively, the "Charging Parties") lacked the protection of the Act when they pursued internal union charges with the unprotected Section 8(b)(1)(B) object of reversing Respondent's selection of Patrick Barrett ("Barrett") as its Painting Foreman. Specifically, the ALJ erroneously conflated actual violations of Section 8(b)(1)(B) by labor organizations, which require agency status by the offending individual(s), with losses of protection due to unlawful employee objectives, which do not require

[1] References to the ALJ's Decision are identified by the letter "D" followed by page and line number, e.g., "D. ___:___." References to the hearing transcript are by the letters "Tr.", followed by page number, e.g., "Tr. ___." References to exhibits introduced by the General Counsel are by the letters "GC", followed by exhibit number, e.g., "GC-___". References to exhibits introduced Jointly are by the letter "J", followed by exhibit number, e.g., "J-___." Finally, references to exhibits introduced by the Cardinals are by the letters "R-" followed by exhibit number, e.g., "R-__ ."

agency status. The ALJ also suggested, without specifically finding, that Barrett is not a Section 8(b)(1)(B) representative, despite the applicable collective-bargaining agreement ("CBA") specifically designating him as a formal grievance representative, Barrett actually serving as a formal grievance representative, and his routine adjustment of informal grievances involving contract interpretation. Finally, the ALJ failed to seriously consider Respondent's evidence of unlawful objects, instead dismissing those facts as mere assertions of "bad faith," which do not cause a lack of protection.

The ALJ also erred in rejecting Respondent's *Wright Line* rebuttal defenses, even though the valid and legitimate reasons Respondent acted as it did with regard to each Charging Party were unrebutted. Specifically, Respondent took no adverse action against Thomas Maxwell, to whom it twice offered work consistent with past practices and offers extended to other painters. Respondent did not offer work to Charging Parties James Maxwell and Kramer because Barrett, the sole decision maker, acting unbound by any past practices or other unique legal obligations, possessed very specific concerns about their work performance, including the undenied use of marijuana on the job. Additionally, James Maxwell made it clear to Respondent that he would not work for Barrett. Bell, meanwhile, did not receive a job offer because he was then *already working* at the Cardinals' facility ("Busch Stadium") for a painting contractor for the Cardinals. As opposed to the work at issue, Bell performed steel painting work, his typical line of work, for the Cardinals' contractor.

For both of these reasons, the ALJ's findings that Respondent violated the Act are unsupported by the preponderance of the evidence and applicable law. As such, the findings should be reversed and the Amended Complaint dismissed with prejudice.

I. STATEMENT OF THE CASE

A. Procedural Background

Joe Bell filed the instant Charge on January 18, 2018 on behalf of himself and his three fellow Charging Party painters, alleging the Employer violated Section 8(a)(1) and (3) of the Act by discharging and/or refusing to recall the Charging Parties in retaliation for union activities. (GC-1(a)). On April 26, 2018, the General Counsel issued a Complaint on those allegations, as well as multiple purported statements allegedly violative of Section 8(a)(1) of the Act. (GC-1(e)).[2]

The parties participated in a Hearing in this matter on August 21 and 22, 2018, with the Hon. Judge Arthur Amchan presiding. Each of the parties presented evidence and witness testimony at the Hearing. Specifically, the General Counsel presented each of the four Charging Parties, as well as Union Business Manager Gregg Smith, and Respondent presented (i) Owner of Shamel Construction, Bob Shamel ("Shamel"), (ii) Director of Facility, Security and Stadium Operations Hosei Maruyama ("Maruyama"), and (iii) Painting Foreman Barrett.

The evidence presented at the Hearing supports dismissal of the Charge for the following reasons:

(1) The Charging Parties are not entitled to protection under the Act regarding their internal Union charges because they pursued such charges with the unlawful object of causing the Union to violate Section 8(b)(1)(B) of the Act;

(2) Respondent could not have violated Section 8(a)(1) of the Act through any statements related to the Charging Parties' internal Union charges because those charges lacked protection; and

(3) Even assuming *arguendo* that the Charging Parties were entitled to the Act's protection in connection with their internal Union charges, Respondent would have taken the same actions in the absence of those charges.

[2] The General Counsel subsequently amended the Complaint on July 26, 2018 to add an additional allegation of agency status. (GC-1(k)). All subsequent references to the "Complaint" incorporate the Amended Complaint.

On Friday, October 12, 2018, the parties submitted Post-Hearing Briefs to the ALJ outlining, in detail, their positions on these factual and legal issues. After only two full business days, on Wednesday, October 17, 2018, the ALJ issued the ALJD, finding unlawful Respondent's actions with regard to all four Charging Parties, as well as one statement found to violate Section 8(a)(1).

B. Respondent's Operations and the Painting Foreman Position

Respondent owns and operates a Major League Baseball team with a home ballpark of Busch Stadium (the "Stadium") in St. Louis, Missouri. (D. 1). As part of its Stadium maintenance activities, Respondent employs crews of painters each season. Painters' District Council #58 ("Union") represents those painters, and Respondent is signatory to a CBA with the Union. (GC-2). Over the decades, Respondent and the Union have enjoyed a history of peaceful and amicable relations. (Tr. 55). Respondent hires a separate crew for each baseball season. (Tr. 311-12). The CBA does not require Respondent to retain painters from season to season, but instead Section 6 - "Union Security" - only requires Respondent to employ Union members in good standing to perform unit work. (GC-2) (Tr. 179, 228, 111-12, 302, 311, 372-73).

Respondent's painting foreman holds the only full-time painting position at the Stadium. (Tr. 282). The foreman hires the crew each season, assigns and oversees all work, manages the painting department budget, and is generally responsible for the interior and exterior aesthetics of the Stadium. (Tr. 279, 373). The foreman also adjusts both formal grievances, in accordance with Section 3 of the CBA, and day-to-day informal grievances regarding pay, scheduling, and other terms and conditions of employment. (GC-2) (R-9) (Tr. 279-80).

Former foreman Billy Martin held the Painting Foreman position with Respondent for approximately 34 years before retiring at the end of the 2017 season. (D. 2:9-10, 32). At that time,

Respondent interviewed painters Barrett, James Maxwell, and Thomas Maxwell (James' brother) to potentially succeed Martin in the position. (D. 2:33-35). James Maxwell expressed to Barrett that Maxwell "assumed that he was going to get [the job] because he was next in line." (Tr. 299). Maxwell added, "If I don't get it . . . I am going to get a lawyer and sue [Respondent] for age discrimination." (Tr. 300). However, Respondent's Director of Facility, Security and Stadium Operations, Hosei Maruyama ("Maruyama"), informed the candidates in November 2017 that Respondent would award the painting foreman position to Barrett. (D. 2:35-37). As the ALJ noted, "J[ames] Maxwell, Thomas Maxwell and Eugene Kramer were unhappy with this selection." (D. 2:37-38).

C. The Charging Parties Sought to Use Internal Union Processes to Reverse Respondent's Painting Foreman Hiring Decision.

Within hours of receiving news of Respondent's decision to hire Barrett as the new painting foreman, James Maxwell informed Maruyama he intended to pursue internal Union charges against Barrett. (Tr. 256-57). He also emphatically told Maruyama, "I can't work for [Barrett]." (*Id*.).[3] The stated basis of Maxwell's charges would be that Barrett performed non-Union work ("side work") for Shamel Construction in the past. (GC-3). Maxwell, along with his brother Thomas, Kramer, and Bell, formally filed these internal charges on December 4, 2018 (D. 3:21-23). The Maxwell brothers and Kramer knew Barrett performed side work because they worked alongside him on those side jobs. (D. 3:25-29). Likewise, Bell informed Barrett in November 2017 that he was willing to perform side work, and even provided Barrett with his phone number

[3] Tom Maxwell later called Maruyama as well, recorded the call, and complained about Respondent's selection of Barrett. (GC-9). During this call, Maruyama, in reference to James Maxwell's comment about his unwillingness to work for Barrett, explained, "there are consequences for actions, and unfortunately, you know, this is what it came down to." (*Id*.) (Tr. 264). The ALJ found a violation of Section 8(a)(1) based on Maruyama's statement. (D. 5:7-16). Additionally, the contents of this call confirmed that hiring the crew was solely Barrett's responsibility. (GC-9). It should also be noted that Thomas Maxwell recorded two calls with Maruyama, but the General Counsel only entered one recording into evidence. (Tr. 218-19).

in an apparent effort to facilitate future side work. (Tr. 133-34, 296-97). Despite their own side work, however, the Charging Parties never filed internal charges against one another or otherwise reported their own side work to the Union. (Tr. 224-25).

The internal Union charges specifically demanded Respondent remove Barrett as Foreman. (GC-3). The Charging Parties clearly specified this outcome as the object of their charges on multiple other occasions as well. For example, James Maxwell (or, according to him, his wife) initiated a social media campaign asking Union members to pressure Respondent into firing Barrett. (R-7) (Tr. 79). All four Charging Parties stated during Barrett's January 3, 2018 internal Union trial that Barrett should be removed in favor of any one of them. (Tr. 111, 113, 141, 306). Furthermore, the Charging Parties appealed the Union's decision when it did not direct Barrett to resign as foreman, or to pay a more onerous fine. (D. 3:33-35). Finally, the Charging Parties admitted this object in their testimony. (Tr. 72-74, 137-38, 173-78, 183, 228).

Following both sides' presentation of evidence at the January 3, 2018 Trial Board proceedings, the Union's panel deliberated without the Charging Parties or Barrett in the room (Tr. 306). Ultimately, the Trial Board imposed a $15,000 fine on Barrett. (D. 3:32). The Union demanded payment of $3,000 of that fine within 90 days, and held $12,000 in abeyance pending any further violation. (D. 3:32-33). The fine represented the largest fine ever recalled by Barrett, a 20-year Union veteran. (Tr. 285). This punishment also represented the first time the Union had punished anyone for side work since 1978. (Tr. 289-90). Barrett later borrowed against his home to pay the $3,000 immediately due. (Tr. 307). Had he not paid the fine, Barrett would have no longer been a Union member "in good standing," and thus considered by the Union, Respondent, and all individuals involved to be ineligible for further work for Respondent. (GC-2) (Tr. 179, 228, 111-12, 302, 311, 372-73).

Following the Trial Board proceedings and imposition of Barrett's fine, the Union and Respondent met at the Stadium on January 9, 2018 regarding Barrett's new duties and the internal charges. (Tr. 107-08, 309-11). Barrett participated in the meeting as Respondent's representative. During the meeting, the parties discussed the internal Union charges against Barrett, as well as the Union's desire for Barrett to consider using its hiring hall list to help hire his crew. (Tr. 310-11).[4] Union Business Agent Gregg Smith informed Respondent during the meeting that Barrett could retain his position, stating "as long as [he] paid [his] fine in that ninety days, [he] would not lose [his] card, and [he] would be a member in good standing." (Tr. 311) (D. 4:2-5). Barrett understood this statement to mean that he would lose his position if he did not pay the fine. (Tr. 311).

Meanwhile, the Union also processed a grievance filed by the Charging Parties against Respondent regarding Barrett's promotion. (D. 4:15-20). Respondent, through Barrett and Vice President of Stadium Operations Matt Gifford, denied the grievance. (R-9). Respondent maintained its denial at a February 21, 2018 Joint Trade Board meeting in which Barrett participated as Respondent's representative. (Tr. 334). The Joint Board unanimously denied the grievance on February 21, 2018, holding Respondent had not violated the CBA by promoting Barrett to foreman. (D. 4:18-20).

D. Respondent Hired Its 2018 Season Crew Based on Barrett's Impressions of Work Performances and Availability

Respondent hires its painting crews before each season on a rolling basis. (Tr. 312). The factors determining when it hires any particular painter include the weather, the projects requiring completion, and whether the team begins the season at home or on the road. (*Id*.). In 2018, the team began its season on the road. (*Id*.). The most common time for painters to receive calls

[4] The hiring hall is non-exclusive. (GC-2, Sec. 7) (Tr. 100).

offering them work is during the month of February, with offers to commence work between four and eight weeks before the home opener. (Tr. 312-13).

In 2018, Barrett began the hiring process by obtaining a copy of the hiring hall's out-of-work list from the Union. (R-11) (Tr. 314). He used the list and other independent knowledge of individuals' circumstances to determine whether those individuals were employed at the time. (Tr. 320-21). Then, Barrett made his offers to painters for the 2018 seasons as follows:

1. Mark Ochs – second week of January. (Tr. 315).
2. Michael Burns – January. (*Id*.).
3. Thomas Maxwell – voicemails on February 5 and February 8. (D. 4:36-37).
4. Tim O'Neil – second week of February. (Tr. 315-16).
5. Bruce Noss - second week of February. (*Id*.).
6. Dave Sobkoviak - second week of February. (Tr. 316.).
7. Duane Oehman – second week of February. (Tr. 316-17).
8. Angie Ramshaw – Union apprenticeship program. (Tr. 317).

Thomas Maxwell, who had found another job, never responded to the voicemails regarding his offers. (Tr. 202-03, 317-18). When asked why he made Thomas Maxwell an offer despite his participation in the internal Union charges, Barrett testified, "Tom is a good painter." (Tr. 321). Similarly, all of the other regular painters to whom Barrett tendered offers had demonstrated strong work abilities, either to Barrett directly or to others whom Barrett trusted. (Tr. 319-20). Additionally, Barrett understood each of those individuals to be available for work. (Tr. 320-21).

Barrett explained on direct testimony the internal Union charges filed by the Charging Parties contributed "a little bit" to his decisions not to offer work to James Maxwell, Eugene

Kramer, and Joe Bell. (Tr. 311). However, as the offer to Thomas Maxwell demonstrates, other considerations ultimately controlled the final decision.

In contrast to Thomas Maxwell, Barrett did not offer work to James Maxwell and Kramer because he assessed their work and work ethics as poor. For example, James Maxwell "would go missing quite a bit," would unprofessionally sit down while painting, was "sloppy," would sleep while on the clock, and had returned to work after smoking marijuana during lunch breaks. (R-6(a)) (Tr. 321-24). Maxwell had also significantly compounded his deficiencies by "passionate[ly]" and "very adamant[ly]" telling Maruyama that he could not work with Barrett. (Tr. 256-57, 324-25). When Maxwell later attempted to revoke that comment by saying he would "bite his lip and try to make it work," Barrett, naturally and logically, found that statement insufficient. (Tr. 257-58, 325).

Like James Maxwell, Barrett assessed Kramer's prior work as poor based on prior experiences. He explained Kramer performed substandard work, both at the Stadium and on a non-union side work job for Shamel Construction. (Tr. 295-96, 326). In fact, Kramer's work for Shamel was so deficient, it required Barrett and Shamel to spend "more time cleaning up and redoing that [than] had we just done it ourselves originally." (Tr. 326). Shamel himself confirmed the need to "redo everything," and even refinish the building's hardwood floors due to Kramer's deficient work. (Tr. 250-51). Also like James Maxwell, Barrett witnessed Kramer using marijuana during the work day, with detrimental impacts on his work performance. (Tr. 327). Conversely, Barrett never witnessed any of the individuals who worked for Respondent during 2018 using marijuana. (*Id.*).[5]

[5] In one other similarity with James Maxwell, Kramer admitted he "probably" also said he could not work for Barrett. (Tr. 181).

Bell, on the other hand, did not receive an offer because Barrett believed Bell was already working as a steel painter, his typical line of work, for one of Respondent's contractors at the Stadium, and thus unavailable to Respondent. (Tr. 327).[6] Barrett held this belief for quite straightforward reasons: Barrett witnessed him working for Respondent's steel painting contractor at the Stadium in mid-to-late January 2018, and his name did not appear on the Union's hiring hall list. (R-11) (Tr. 327-28). Bell himself testified he worked at Busch Stadium for that contractor "[a]ll the way up until February [2018]." (Tr. 125).

Importantly, the General Counsel presented no evidence contradicting Barrett's assessments of James Maxwell or Eugene Kramer's work performances or drug use, nor any evidence contradicting Joe Bell's steel painting work at Busch Stadium in mid-late January 2018. As a result, that testimony stands unrebutted.

II. STANDARD OF REVIEW

Under *Standard Dry Wall Products, Inc.*, 91 NLRB 544, 545 (1950), enfd. 188 F.2d 362 (3rd Cir. 1951), the Board is to "base [its] findings as to the facts upon a de novo review of the entire record." *Id*. That same standard applies to the ALJ's legal conclusions and derivative inferences. *Id*. The "clear preponderance of the evidence" standard only governs Board review of an ALJ's credibility determinations. While an ALJ can consider all the evidence without directly addressing in the written decision every piece of evidence submitted by a party, an ALJ's factual findings *as a whole* must show that he or she "implicitly resolve[d]" conflicts created by all the evidence in the record. *NLRB v. Berger Transfer & Storage Co.*, 678 F.2d 679, 687 (7th Cir. 1982); *NLRB v. Katz's Delicatessen of Houston St., Inc.*, 80 F.2d 755, 765 (2nd Cir. 1996)

[6] Steel painting differs from the painting performed by Barrett's crew because steel painters must often climb to work at heights, the work involves different materials, creates more dirt, and is less detail-oriented. (Tr. 298). Bell estimated approximately 90% of his work is steel painting work. (Tr. 131).

(noting an ALJ may resolve credibility disputes implicitly rather than explicitly where his "treatment of the evidence is supported by the record as a whole.").

The critical element in this standard is the phrase "on the record as a whole." The Board may not make its determination without taking into account contradictory evidence and evidence from which conflicting inferences could be drawn. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951). Rather, the Board must "take into account whatever in the record fairly detracts from [the] weight" of the ALJ's decision. *TNS, Inc. v. NLRB*, 296 F.3d 384, 395 (6th Cir. 2002) (quoting *Universal Camera Corp.*, 340 U.S. at 487). Stated another way, it is "not good enough" that the record contains *some* evidence that could have conceivably supported an ALJ's finding. The *Universal Camera* standard is not satisfied if the ALJ does not discuss, or even provide a citation, to that evidence. *Sears, Roebuck & Co. v. NLRB*, 349 F.3d 493, 514 (7th Cir. 2003) (citing *Scivally v. Sullivan*, 966 F.2d 1070, 1076 (7th Cir. 1992) (holding, "the ALJ must minimally articulate his reasons for crediting or rejecting" evidence)).

III. ARGUMENT

A. The ALJ Erroneously Rejected Respondent's Assertion That the Charging Parties' Internal Union Charges Lacked Protection Due to The Unlawful Section 8(b)(1)(B) Object of Those Charges

1. The Charging Parties Need Not Be Agents of a Labor Organization to Lose the Protection of the Act.

Respondent has excepted:

1. To the conclusion that "Section 8(b) applies [only] to labor organizations and their agents. The Board has never held that rank and file union members can violate 8(b)." (D. 6:43-44) since this conclusion is contrary to law and disregards the distinction between a loss of protection and a violation of Section 8(b).

2. To the conclusion that *Bovee and Crail Construction Co.*, 224 NLRB 509 (1976) does not govern and is distinguishable from this proceeding, since this conclusion is contrary to law.

3. To the conclusion that *Preferred Building Services*, 366 NLRB No. 159 (Aug. 28, 2018) and *Consolidated Communications*, 367 NLRB No. 7 (Oct. 2, 2018) are off point, to the ALJ's failed attempt to distinguish them and to the ALJ's failure to follow these Board decisions (D.7: fn. 7), since the ALJ's conclusion his failure to follow these Board decisions are contrary to law.

The ALJ's analysis failed to meaningfully address Respondent's assertion that the Charging Parties' internal union charges lacked protection due to their object of reversing the selection of a Section 8(b)(1)(B) representative. One manner in which the ALJD avoids thorough treatment of the issue arises from its cursory conflation of violations of Section 8(b) on one hand, and losses of protection on the other. (D.6:43-44).

In fact, the Board has long held that the absence of official roles within the Union does not extend the Act's protection to the employees' efforts to cause a violation of the Act. The Board determined, more than 40 years ago, that individual employees lose the Act's protection for intraunion activities seeking to use their union as a vehicle to cause a Section 8(b)(1)(B) violation. It explained:

> It is well settled that employees who engage in intraunion activity are protected from reprisal or discrimination by their employer. However, where such activity transcends purely internal union affairs and interferes with a supervisor-member's conduct in the course of representing the interests of his employer, the activity may be violative of Section 8(b)(1)(B) **and therefore lose its protection.**
>
> *Bovee and Crail Construction Co.*, 224 NLRB 509, 509 (1976) (emphasis added).

The *Bovee and Crail* Board directly addressed concerns about applying a Section of the Act aimed at institutional parties to individual employees. Drawing apt analogies to other unprotected individual actions, it responded:

> The thrust of our dissenting colleague's analysis appears to be that the Union must be considered only as an entity, and that its agents are not individually culpable as employees so long as they are assisting the Union. That is simply not the law. Employees, acting on behalf of the Union, may under certain circumstances lose the protection of the Act when they engage in slowdown activities, disparage their employer's product, or participate in a strike or in picketing in violation of a no-strike clause. Our dissenting colleague would, without legal justification, insulate

> the perpetrators of the unlawful act from the act itself. We cannot accept that reasoning.

Id. at 511 (emphasis added) (internal citations omitted). *See also Industrial First Inc.*, 197 NLRB 714 (1972) (finding discharge lawful because employer established the reason for the discharge was employee's threat to pursue internal union charges against foreman over work assignment dispute).

The ALJ attempted to distinguish *Bovee and Crail* on the basis that it is "inconsistent with" a line of cases standing for the proposition that "employees have a protected right to complain about a supervisor and even to seek the supervisor's discharge, when the supervisor's conduct can affect the conditions of their employment." (D. 5 fn. 6). That false comparison says nothing about the issue here. There is no evidence whatsoever in the record supporting any purpose of the internal union charges related to terms and conditions of employment, nor does anything in the internal charges themselves indicate such concerns. (GC-3). More importantly, the right of employees to complain about their supervisors bears no relation to the question of whether the Act's protection extends to non-agent conduct in pursuit of unlawful Section 8(b) objectives.

The ALJ also notes that the employees at issue in *Bovee and Crail* were members of their union's executive board. That distinction only highlights the unprotected nature of the Charging Parties' conduct here. In *Bovee and Crail*, the employees' actions did not *actually* cause the removal of a Section 8(b)(1)(B) representative, and no Section 8(b)(1)(B) violation was *actually* found. Nonetheless, the employees' attempts to cause a Section 8(b)(1)(B) violation (by signing an executive board letter) lacked the Act's protection. Just like those employees, the Charging Parties here attempted to cause a Section 8(b)(1)(B) violation by seeking to use Union mechanisms to reverse Respondent's selection of Barrett as painting foreman. **The fact that the Charging Parties acting alone could not have caused a Section 8(b)(1)(B) violation does not mean the**

Act protects their attempts to have the Union commit the violation on their behalf. Indeed, even the executive board members in *Bovee and Crail* could not have caused a violation if they acted outside the scope of authority conferred upon them by the Union.[7]

The Board, in two very recent cases, affirmed that individuals lose protection by acting in furtherance of objects proscribed by Section 8(b) of the Act**, even if those individuals do not constitute agents of their union**. In *Preferred Building Services, Inc.*, 366 NLRB No. 159 (Aug. 28, 2018), the Board upheld the employer's discharge of employees for picketing that held a proscribed Section 8(b)(4)(ii)(B) object. The unrepresented employees engaged in a day of picketing without the participation or authorization of any union. *Id*., slip op. at n. 5 (noting a union organizer with whom the employees had consulted "did not participate in this [first day of] picketing" and "it is unclear" whether a representative of a local social justice organization participated). In other words, the employees lost protection due to their proscribed Section 8(b)(4) objects, even though they were not agents of any union, and even though Section 8(b)(4) of the Act, like Section 8(b)(1)(B), applies on its face to labor organization conduct. The offending employees' unlawful objects were sufficient to cause a loss of protection (and lawful discharges), regarding of agency status.

Even more recently, the Board reached a similar conclusion in *Consolidated Communications*, 367 NLRB No. 7 (Oct. 2, 2018). There, a striking employee, without agency status or authorization from her union, followed the employer's truck in a dangerous manner, then blocked its progress, in an attempt to facilitate ambulatory picketing. The Board, drawing on the

[7] Similarly, in *Industrial First*, the discharged employee possessed a history as a union office-holder. 197 NLRB at 715. Nonetheless, the Trial Examiner's decision, as adopted by the Board, explained the employee lost protection due to his plan "to press intraunion charges against [the Section 8(b)(1)(B) representative]." *Id*. An employee need not be a union agent to press internal union charges, and Respondent does not understand the ALJ or General Counsel to contend that internal union fines amount to less than restraint and coercion.

language of Section 8(b)(1)(A), found the employee's conduct "would reasonably tend to coerce or intimidate employees in the exercise of Section 7 rights, including the right to refrain from striking." Of course, an individual cannot violate Section 8(b)(1)(A). An individual can, however, lose the Act's protection by acting in furtherance of an 8(b)(1)(A) object, as *Consolidated Communications* confirms.

As with *Bovee and Crail*, the ALJD contains unsuccessful attempts to distinguish *Preferred Building Services* and *Consolidated Communications*. The ALJ's first statement simply reflects circular reasoning: "the employees in those cases, unlike the employees in this case, were discharged for conduct that was unprotected." (D. 7, fn.7). Those employees' conduct, picketing, was protected *ab initio*, only to *become* unprotected due to their unlawful objects.

The ALJ also points to "substantial involvement of union officials" in *Preferred Building Services*. As explained above, this interpretation misreads the case. Furthermore, **there was more involvement of union officials in the filing of internal charges here than in the *Preferred Building Services*, and nowhere does the *Preferred Building Services* Board categorize the employees as union agents.**

Similarly, the ALJ attempts to distinguish *Consolidated Communications* by stating that it "is not even a Section 8(b) case." Neither is the instant case. There, as here, the General Counsel alleged a violation of Section 8(a)(3) of the Act due to discharge for purportedly protected activity. There, as here, the employee's conduct lacked protection due to unlawful objects. The Board measured the unlawful object in *Consolidated Communications* against the Section 8(b)(1)(A) standard. The employee there, contrary to the ALJ's assertion that her conduct was "only tangentially related, if at all, to union activity," dangerously attempted to facilitate ambulatory

picketing. The facts that she did not act as an agent of the union, and consequently no actual violation of Section 8(b)(1)(A) occurred, did not render her picket line misconduct protected.

The ALJD articulates no reason why the Board would treat a non-agent employee's Section 8(b)(1)(B) objects any differently now than it did in *Bovee and Crail* in 1976, nor differently from its treatment of Section 8(b)(4) objects in *Preferred Building Services* on August 28, 2018, nor differently from its treatment of Section 8(b)(1)(A) objects in *Consolidated Communications* on October 2, 2018.

It bears pause to ask, what standard do the ALJ and General Counsel really advocate here? If a group of employees engage in a sit-down strike, or unlawful secondary picketing, or strike a healthcare institution without the required Section 8(g) notice, is their employer permitted to discharge all of the union stewards and officeholders, while being required to leave non-agents untouched? Does not such a standard itself discriminate against those dual employee/union agents on the basis of their protected union offices? What impact would that standard have on labor relations if the holding of union office resulted in *less* statutory protection? Of course, Board law does not require such absurd results. Attempts to cause a union to violate Section 8(b) of the Act do not enjoy the Act's protection, even if the attempt is made by an employee who does not represent the union.

The same could be said of other national labor policies. If a male employee filed a grievance because, "there are too many women working here," seeking a remedy of, "fire all the women and replace them with men," the Board would surely find that grievance unprotected as a matter of national labor policy. *Southern S.S. Co. v. N.L.R.B.*, 316 U.S. 31, 47 (1942) (observing, "the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives");

Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50 (1975) (examining relationship between Title VII and Section 7 rights). The fact that the male employee could not violate Title VII of his own accord would not mean that his non-agency status rendered the grievance protected. The difference here is that, unlike Title VII, the offended statutory provision is contained within the same statute under which the General Counsel alleges a violation.

As a result, the Charging Parties' proscribed objects of restraining and coercing Respondent in its selection of its Painting Foreman lack the protection of the Act, regardless of whether they acted as agents of the Union.

2. Respondent's Painting Foreman, Patrick Barrett, is a Section 8(b)(1)(B) Representative.

Respondent has excepted:

4. To the ALJ's failure to find that the Cardinals' Painting Foreman, and in particular Barrett, is a Section 8(b)(1)(B) representative.

5. To the ALJ's failure to find that the CBA between the Cardinals and the union expressly names the Painting Foreman as the Step One representative of the Cardinals for purposes of the adjustment of grievances which arise under the CBA (GC-2, Sec. 3, p.6), since this failure ignored the substantial and material evidence in the record.

6. To the finding that Barrett had not been formally designated as the Cardinals' grievance adjustment representative on December 4, 2017 (D.7:4-5), since this finding is irrelevant, contrary to the substantial evidence in the record, and is unsupported by the record.

7. To the ALJ's failure to find that Barrett attended the January 9, 2018 meeting with the union (D. 4:1-5) as a grievance representative of the Cardinals, since this failure ignored the substantial and material evidence in the record.

8. To the ALJ's failure to find that during the January 9, 2018 meeting with the union, Barrett and the Cardinals, the union asked that Barrett at least consider the union hiring hall's out of work list, since this failure ignored the substantial and material evidence in the record.

9. To the ALJ's failure to find that, in making the hiring decisions attacked in this proceeding, Barrett did consult the union hiring hall's out of work list (RX-11) and

did consider whether the painters he wanted to hire appeared on this list, since this failure ignored the substantial and material evidence in the record.

10. To the finding that, at the Joint Trade Board meeting of February 21, 2018, it was not clear as to the scope of Barrett's grievance adjustment authority (D.7: fn. 8), since this is contrary to the substantial evidence in the record, and is unsupported by the record.

11. To the ALJ's failure to find that, although only one formal grievance has been filed against the Cardinals during Barrett's tenure as Painting Foreman, Barrett has adjusted workplace grievances as they have arisen, since this failure ignored the substantial and material evidence in the record.

12. To the finding that, when the Charging Parties filed the internal union charges, they had no way of knowing that Barrett would be the Cardinals' grievance adjustment representative (D.7:1-3, fn. 8), since this is irrelevant, contrary to the substantial evidence in the record, and is unsupported by the record.

13. To the ALJ's failure to find that, over the years while he was Painting Foreman, Billy Martin frequently adjusted workplace grievances, since this failure ignored the substantial and material evidence in the record.

The ALJD does not contain a clear ruling regarding Barrett's status as a Section 8(b)(1)(B) representative, but several assertions by the ALJ seem to suggest such a concern. To the extent the ALJD does not find Barrett to be a Section 8(b)(1)(B) representative, any such failure constitutes a significant and obvious error.

As the Supreme Court has noted, supervisors with a formal role in contractual grievance adjustment processes clearly fall within the statutory definition. *NLRB v. IBEW Local 340*, 481 U.S. 573, 588 (1987); *see also Florida Power and Light Co. v. IBEW Local 641*, 417 U.S. 790 (1974). Here, Section 3 of **the CBA specifically identifies the painting foreman as Respondent's Step One grievance representative.** (GC-2). The painting foreman also serves as Respondent's formal grievance representative in practice. Barrett himself issued Respondent's response to the Charging Parties' grievance here. (R-9). He also participated in a meeting with the Union regarding his own hiring practices. (Tr. 107-08, 309-11).

The ALJD seems to point to the absence of prior grievances, and the fact Respondent saw no need to formally designate Barrett as a representative, as reasons to question Barrett's Section 8(b)(1)(B) status. However, Respondent's history of peaceful labor relations and industrial stability, as envisioned by the Act, does not deprive it of the Section 8(b)(1)(B) representative specified in the CBA and in practice. (Tr. 55). Respondent knows of no requirement contained within the considerable canon of Board and Supreme Court law on Section 8(b)(1)(B) which would require it to make a formal designation or announcement of its Section 8(b)(1)(B) representative. Such a process seems particularly unnecessary in an environment in which formal grievances are exceedingly rare. Furthermore, neither the ALJ nor the General Counsel could identify who, if not Barrett, does perform Section 8(b)(1)(B) functions for Respondent.

The ALJD, at one point, even seems to suggest it would be relevant if the Charging Parties themselves had not received formal notice of Barrett's Section 8(b)(1)(B) status. (D.7:1-3, fn. 8). This suggestion defies explanation on various levels. First, as long-term Union members who knew enough about the By-Laws to file internal charges regarding side work, one would expect a level of familiarity with the contractual grievance procedure. In fact, they *did* file the grievance referred to in this case. (R-9). Surely, the Maxwell brothers, at least, knew of prior Painting Foreman Billy Martin's many adjustments of workplace issues over the years. More importantly, no authority holds that employees cannot lose protection if they do not know of a representative's Section 8(b)(1)(B) status. The issue is overridingly simple: the Charging Parties tried to reverse Respondent's selection of Barrett, and Barrett is Respondent's Section 8(b)(1)(B) representative.

Additionally, in the one grievance that *has* been filed, Barrett represented the Cardinals at a grievance meeting and a Joint Trade Board meeting. (D. 4:15-20) (R-9) (Tr. 334). Moreover, during the January 9, 2018 meeting between Respondent and the Union, the Union asked Barrett

to use its hiring hall list in exercising his discretion under the CBA to hire painters. (Tr. 107-08, 310-11). One could hardly imagine a more "8(b)(1)(B) function" than a representative discussing with the union how he will exercise his bargained-for hiring authority *vis-à-vis* the hiring hall.

The Board also considers individuals holding contractual interpretation and administration duties through informal grievance resolution to be Section 8(b)(1)(B) representatives. *See Local No. 10*, 338 NLRB 701, 701 (2002) (relying on supervisor's "daily responsibilities" involving "wage rates, expenses, work hours, length of breaks, poor work performance, and safety issues…albeit at an informal level before such complaints become subject to the formal grievance procedure" to find him to be an 8(b)(1)(B) representative); *Sheet Metal Workers Local 104 (Simpson Sheet Metal)*, 311 NLRB 758 (1993) (holding, "a supervisor's contractual interpretation function brings him within the 8(b)(1)(B) definition of 'representative'") *enf. denied* 64 F.3d 465 (9th Cir. 1995).[8] Here, both Barrett and predecessor Billy Martin have adjusted informal grievances in the normal course of their duties, including issues about wages, schedules, and other terms and conditions of employment. (Tr. 279-80). For example, Barrett handled an issue involving Union apprentice program employee Angie Ramshaw's pay scale under the CBA. (Tr. 387). As a result, Barrett's status as a Section 8(b)(1)(B) representative is beyond dispute, and the Board should correct any suggestion by the ALJ to the contrary.

3. <u>The Charging Parties' Conduct Lacked Protection Because They Filed and Pursued Internal Union Charges With an Unlawful Section 8(b)(1)(B) Object of Reversing Respondent's Selection of Barrett as Painting Foreman.</u>

Respondent has excepted:

> 14. To the conclusion that the filing of internal union charges by the Charging Parties was not rendered unprotected because they were pursuing the unlawful object of Barrett's removal as Painting Foreman (D.5, fn. 6), since this conclusion ignores

[8] The Board has not acquiesced to the 9th Circuit's denial of enforcement in *Simpson. International Union of Elevator Constructors, Local 5*, 1996 WL 33321440, at *13 (ALJD 1996)

and is contrary to law establishing that their objective made their activities unprotected.

15. To the ALJ's failure to find that the object of the internal union charges filed by the Charging Parties was to restrain and coerce the Cardinals in its selection of its representatives for the purposes of the adjustment of grievances, since this failure ignored the substantial and material evidence in the record.

16. To the conclusion that the Cardinals' principal defense was that the Charging Parties engaged in protected conduct in bad faith (D.6:32-33), since this conclusion is contrary to the entire record: the Cardinals never asserted that the Charging Parties' bad faith was a defense. While the Cardinals did assert that the Charging Parties' bad faith was evidence of their pretextual explanations for their conduct, the Cardinals' two principal defenses throughout these proceedings were as follows: (i) that the General Counsel could not and did not submit a *prima facie* case since the Charging Parties did not engage in any protected conduct; and (ii) that the Cardinals would have made the same decisions on offering/not offering employment even if the Charging Parties had not engaged in protected conduct.

17. To the ALJ's failure to find that all explanations offered by the Charging Parties for filing internal union charges, other than that their object was to restrain and coerce the Cardinals in its selection of its representatives for the purposes of the adjustment of grievances, were pretextual given their own conduct in performing non-union painting work and given the timing of the internal union charges filed, since this failure ignored the substantial and material evidence in the record.

18. To the conclusion that there is no credible evidence that Joe Bell had violated the union's by-laws or acted in bad faith (D.6:37-38), since this conclusion is contrary to the substantial evidence in the record and is unsupported by the record.

19. To the ALJ's failure to find that Bell admitted to Barrett that he had performed non-union work while a member of the union and gave Barrett his telephone number for purposes of securing more non-union painting work (TR 134, 297), since this failure ignored the substantial and material evidence in the record.

20. To the finding that there was no credible evidence that Bell performed painting work for non-union companies while a member of the union (D.3:fn.2), since this finding is contrary to the substantial evidence in the record and is unsupported by the record.

21. To the conclusion that the Cardinals' position is inconsistent with *Elevator Constructors (Otis Elevator Co)*, 339 NLRB 1122 (2003), since this conclusion is contrary to law.

22. To the ALJ's failure to conclude that the conduct of the Charging Parties was unprotected because they sought to cause a violation of Section 8(b)(1)(B) of the

> Act, or lost protection for other reasons, since the failure to so conclude is contrary to law. [Clarify]

The ALJ grossly mischaracterized Respondent's defense of a lack of protection due to unlawful Section 8(b)(1)(B) objects as a mere assertion that the Charging Parties "engaged in the protected conduct in bad faith." (D. 6:32-33). Although the ALJD describes this straw man as "Respondent's principal defense," (D. 6:32), Respondent has never asserted a loss of protection due to "bad faith." Instead, Respondent presented evidence of the Charging Parties' own side work, and the timing of their internal union charges immediately following Barrett's selection as Painting Foreman, to show their object of causing the Union to "restrain or coerce [Respondent] in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances[.]" 29 U.S.C. § 158(b)(1)(B).[9]

The Board has long held the filing of internal union charges against a Section 8(b)(1)(B) representative constitutes "coercion" for purposes of that Section.

> The conduct proscribed by Section 8(b)(1)(B) includes union discipline of a supervisor-member which may 'adversely affect' the manner in which the supervisor-member performs collective bargaining, grievance adjustment, or related activities on behalf of an employer.

Local No. 10, 338 NLRB at 701, *quoting San Francisco-Oakland Mailers' Local 18 (Northwest Publications)*, 172 NLRB 2173 (1968).

Here, the Charging Parties sought to cause the Union to engage in several acts adversely affecting Barrett's ability to perform his Section 8(b)(1)(B) duties. Importantly, the Charging Parties literally targeted Respondent's "selection" of Barrett as the painting foreman. A Section 8(b)(1)(B) representative cannot perform any 8(b)(1)(B) functions if prevented from serving in the

[9] Unfortunately, it appears this mischaracterization originated at the outset of the August 21, 2018 hearing, when the ALJ stated, "I am unaware that hypocrisy would be a grounds for finding that the alleged discriminatees are - - that their conduct is unprotected." (TR 8).

role in the first place. Consequently, the facts here fall squarely within Section 8(b)(1)(B)'s purview, as shown by the statute's use of the word, "selection."

The internal Union charges unquestionably restrained and coerced Respondent. In fact, the internal charges caused Barrett to offer to resign from the Painting Foreman position (Tr. 302). Furthermore, the Union imposed a massive $15,000 fine on Barrett. (D. 3:32). The fine itself provides more than sufficient evidence of coercion, because all parties understand that a failure to pay fines results in removal. (Tr. 27, 74, 111-12, 215, 228, 302-03, 311).[10] These circumstances directly implicate Section 8(b)(1)(B)'s "selection" language. Consequently, the Charging Parties' unsuccessful attempts to remove Barrett, and their successful efforts to cause onerous fines, constituted proscribed Section 8(b)(1)(B) objects.[11]

The Board also finds Section 8(b)(1)(B) objects when the offending conduct relates to allegations of anti-union conduct (such as "side work") by the 8(b)(1)(B) representative. One such example arose in *Miscellaneous Drivers and Helpers Local 610*, 236 NLRB 1048 (1978), where a Section 8(b)(1)(B) representative stated during lunch that, "all unions are crooks and thieves." *Id*. at 1049. Enraged, the union's President approached Respondent's Vice President of

[10] The fact that the Union may not have been legally permitted to cause a discharge for non-payment of a fine does not affect the merits here. Section 8(b)(1)(B) makes it an unfair labor practice for a union to "restrain or coerce" an employer in furtherance of its proscribed object. Neither restraint nor coercion depends upon the legal ability to effectuate the proscribed object. In other words, if an individual threatens another person, "I'm going to burn down your house unless you do what I want," the wrongdoer could not defend himself against a blackmail allegation on the basis that, "It would have been illegal to burn down the house." In fact, as the Board well knows, parties to labor disputes all-too-often threaten and/or use illegal means to accomplish proscribed objects. More importantly, all interested parties here, including the Charging Parties (Tr. 27, 74, 215, 228), Respondent's representatives (Tr. 302), Barrett (Tr. 302-03), and the Union itself (Tr. 111-12), believed the Union possessed the ability to force Barrett's removal for non-payment of a fine. That shared belief, coupled with the Charging Parties' efforts to turn that belief into a reality, demonstrates their coercive object. *See Auto Workers Local 1989 (Caterpillar Tractor)*, 249 NLRB 922, 923 (1980) (finding filing of internal union charges and setting of trial date coercive, despite later withdrawal of charges prior to the hearing or imposition of fine).

[11] To be clear, Respondent's assertion that the internal union charges lacked protected does <u>not</u> rest upon the occurrence of an <u>actual</u> Section 8(b)(1)(B) violation. Although Respondent believes the Union's imposition of the fines on Barrett did constitute such a violation, that issue is entirely academic and immaterial to the merits here. Instead, it matters only that the Charging Parties pursued their charges with the **object** of causing such a violation, whether or not a Section 8(b)(1)(B) violation actually took place.

Manufacturing that afternoon and demanded, "I want this man fired[.]" *Id*. Similar to the Union's disavowals of Section 8(b)(1)(B) intent here, the *Local 610* union subsequently wrote a letter disavowing such intent. The Board nonetheless found a Section 8(b)(1)(B) violation.

The evidence leaves no doubt the purpose of the Charging Parties' internal Union charges was to force Respondent to remove Barrett as Foreman. Most apparently, the only reason three of the Charging Parties knew of Barrett's side work in the first place is *they worked alongside him on those jobs*. (D. 3:25-29). In the case of Bell, contrary to the ALJ's reliance on his apparent lack of side work, he knew of Barrett's activities because the pair discussed the topic, and Bell provided his phone number in an attempt to facilitate such work. (Tr. 133-34, 296-97). The Charging Parties' purpose thus was not to curb impermissible side work. Furthermore, the internal charges specifically demanded Barrett step down as foreman (GC-3), and the Charging Parties reiterated that demand before the Trial Board. (Tr. 67, 73, 141, 306) (GC-5). Finally, the Charging Parties admitted this object in their testimony. (Tr. 72-74, 137-38, 173-78, 183, 228). Based upon James Maxwell's pre-decision assumption that he would receive the job, and the Charging Parties' attempts to have the job given to any one of them, it seems their true motive was a desire to obtain the position for themselves. (Tr. 111, 113, 141, 299, 306).

The timing of the charges demonstrates the Charging Parties' true motives as well. James Maxwell informed Respondent the charges would be forthcoming moments after he learned of Barrett's selection as the Painting Foreman. (Tr. 256-57). The Charging Parties decided to pursue these charges immediately after Barrett was selected for the Foreman position, despite knowing of (and participating in) the same side work for *years*. (Tr. 69-71, 121, 206-07, 216, 223-25, 241-45, 291-97). Finally, unsatisfied with the Union's imposition of thousands of dollars of fines on Barrett, the Charging Parties internally appealed the Trial Board's sentence. (Tr. 75, 227, 309).

Consequently, any claim that the Charging Parties pursued their internal Union charges for any reason other than a desire to remove Barrett as Painting Foreman is **pretextual**.[12] The Board commonly rejects pretextual explanations for conduct that violates Section 8(b)(1)(B). *IBEW Local 77 (Bruce-Cadet)*, 289 NLRB 516, 519 (1988) (finding 8(b)(1)(B) violation because true reason for imposing fines was "punishment" for awarding work to another local on behalf of employer, not claimed reason of working outside jurisdiction); *Carpenters & Joiners, Local 1620*, 208 NLRB 94, 99 (1974) (finding internal union fines "a weak coverup; a pretext in an effort to hide the real reasons").

The ALJ, like the General Counsel, seeks to justify the Charging Parties' objects of removing Barrett through misinterpretation of a 2007 Board case: *Elevator Constructors (Otis Elevator Co.)*, 349 NLRB 583 (2007). Faithful application of this case, however, requires a comprehensive understanding of the two historical roads traveled by the Board under Section 8(b)(1)(B). The ALJD fails to recognize this massively important distinction.

In *Elevator Constructors*, a supervisor-member Section 8(b)(1)(B) representative, Scott Cutler, worked as Respondent's mechanic-in-charge on a job. When the union learned of two contract violations present at the site, it fined Cutler $1,000, and held an additional $3,000 fine in abeyance. The Board found the fines lawful because the contract violations did not relate to Cutler's exercise of his own Section 8(b)(1)(B) functions.

Elevator Constructors, and cases like it, address Section 8(b)(1)(B) violations regarding discipline of a supervisor-member's performance of contract interpretation functions. Importantly, however, these types of violations represent only *one type* of violation arising out of the statutory

[12] This, rather than "bad faith" or "hypocrisy" is the reason Respondent emphasizes the Charging Parties' own side work. Since they engaged in their own side work for years, and did not bring the issue to the Union until they were disappointed that Barrett received the Painting Foreman job, rather than one of them, their only goal was to use the Union to reverse Respondent's Foreman selection decision.

language. Indeed, the original, and most fundamental, Section 8(b)(1)(B) violations relate to an employer's "**selection** of his representatives" 29 U.S.C. 158(b)(1)(B) (emphasis added).

The Supreme Court provided a detailed, and directly on-point, explanation of Section 8(b)(1)(B)'s evolution in *NLRB v. Electrical Workers Local 340 (Royal Typewriter)*, 481 U.S. 573, 581-82 (1987) (emphasis added):

> For two decades after enactment, the Board construed § 8(b)(1)(B) to prohibit only union pressure applied directly to Respondent, and intended to compel it **to replace its chosen representative.** In 1968, however, the Board substantially extended § 8(b)(1)(B) in *San Francisco-Oakland Mailers' Union No. 18 (Northwest Publications, Inc.)*, 172 NLRB 2173 (*Oakland Mailers*). The NLRB held that a union violates § 8(b)(1)(B) when it disciplines an employer representative for the manner in which his or her § 8(b)(1)(B) duties are performed. The Board reasoned that the union "interfer[ed] with the [employer's] control over its representatives" by attempting "to compel Respondent's foremen to take pro-union positions in interpreting the collective bargaining agreement," because Respondent "would have to replace its foremen or face *de facto* nonrepresentation by them." *Id*. at 2173-2174. Hence, the Board concluded that union pressure designed to alter the manner in which an employer representative performs § 8(b)(1)(B) functions coerces Respondent in its selection of that § 8(b)(1)(B) representative.

This decision extended § 8(b)(1)(B) in two ways. First, it prohibited indirect coercion of an employer's selection of its grievance representative, which might result from internal union pressure on that representative. Second, it suggested that contract interpretation is so closely related to collective bargaining that it, too, is a Section 8(b)(1)(B) activity. (*Id*.).

Here, Respondent relies on *Oakland Mailers* **only** to the extent that Section 8(b)(1)(B) violations can arise based on "indirect coercion" of Respondent through its grievance representative (Barrett).[13] Otherwise, however, Respondent relies **on the original, pre-*Oakland Mailers*, plain language, view of Section 8(b)(1)(B) conduct**, which focuses on **"selection"** of the representative. The ALJ and General Counsel's apparent beliefs that the internal charges

[13] Although the Charging Parties unsuccessfully sought Barrett's removal, it is noteworthy that one aspect of the result they ultimately obtained - $12,000 of a fine held in abeyance – could also affect Barrett's exercise of his contract interpretation duties in the future.

enjoyed protection because they did not relate to contract interpretation duties must fail, both as a matter of both law, and jurisprudential history.

Elevator Constructors pertains only to the expanded, "contract interpretation" view of Section 8(b)(1)(B). Respondent does not rely on that view. The Charging Parties' objects quite literally targeted Respondent's "selection" of its representative. The statute explicitly emphasizes the word "selection." Consequently, the Charging Parties' unlawful object of reversing Respondent's foreman selection decision establishes their loss of protection.

Ultimately, the Charging Parties' true purpose and intent of removing Barrett as foreman renders their internal Union charges ineligible for protection. As a result, Respondent may rely on the charges as a lawful reason not to hire them for available work during the 2018 season.

B. The ALJ Erroneously Rejected Respondent's *Wright Line* Rebuttal Defense That It Would Have Taken the Same Actions Absent Any Purportedly Protected Activities.

Respondent has excepted:

> 23. To the conclusion that the "same decision" rebuttal defense, as articulated in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982) ("*Wright Line*") and reaffirmed many times, is not applicable where an employer admits that protected, concerted activity played "a little bit" of a role in a hiring decision (D. 5:25 to D.6:7), since this conclusion is contrary to law.
>
> 24. To the conclusion that *Wright Line* and other case law require a conclusion of a violation of the Act where an employer admits that protected, concerted activity played "a little bit" of a role in a hiring decision (D. 6:1-7), since this conclusion is contrary to law.
>
> 25. To the conclusion that the Cardinals' explanations for not recalling Charging Parties are pretextual (D.6:12-13), since this finding is contrary to the substantial evidence in the record, is unsupported by the record, and irrelevant to a rebuttal defense.

Even aside from any other Exceptions, the ALJD's blatantly erroneous approach to *Wright Line* rebuttal defenses independently necessitates its rejection. The standard, as articulated by the

ALJ here, reads a charged party's opportunity to rebut a *prima facie* case out of the *Wright Line* framework entirely. This is no exaggeration – the ALJD states:

> Respondent, through its agent, Patrick Barrett, admitted that this protected activity factored 'a little bit' in its decision not to employ the 4 discriminatees in 2018. This essentially concedes the alleged violation because the Board will not seek to quantitatively analyze the effect of the unlawful cause once it has been found.

(D. 5:25-6:2) (internal citations omitted).

This analysis, as the Board knows, is flatly incorrect. As *Wright Line* itself explains, if a charging party establishes a *prima facie* case, the analysis does not end there. Instead, "the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, 251 NLRB at 1089. *See also NLRB v. Transportation Management*, 462 U.S. 393 (1983) (upholding the Board's *Wright Line* rebuttal approach); *Pacesetter Corp.*, 307 NLRB 514, 521–22 (1992) (finding General Counsel's *prima facie* case was overridden by a critical intervening event, "thus plausibly triggering a sufficient innocent reason" for the employee's termination); *Haynes-Trane Serv. Agency, Inc.*, 265 NLRB 958, 960 (1982) (explaining, "[t]he mere fact that a *prima facie* case can be made is not grounds for a complaint where it is clear that a known defense will overwhelm the *prima facie* case").

The ALJ's rejection of Respondent's *Wright Line* rebuttal, under the pretense that such consideration would amount to "quantitatively analyz[ing]" Respondent's reasons for its actions, constitutes a major deficiency. The ALJ lacks the authority to overrule *Wright Line* with a stroke of his pen. This error is made even more grievous by the fact that Respondent has, with regard to each Charging Party, established that it would have taken the same action absent the Charging Parties' purportedly protected activities.

1. <u>Respondent Would Have Taken the Same Actions Absent Any Purportedly Protected Activities Because Barrett Acted as Sole Decision Maker and was Unbound by Any Past Practices or Other Particularized Legal Obligations.</u>

Respondent has excepted:

26. To the ALJ's failure to find that, upon being appointed Painting Foreman by the Cardinals, Barrett was given free reign to hire, in his judgment, the best painting crew he could find (TR 313), since this failure ignored the substantial and material evidence in the record.

27. To the finding that Billy Martin generally recalled the same painters for seasonal work, year after year and that Barrett continued this practice for painters who had not filed internal union charges against him (D.4:23-25), since this finding is irrelevant, contrary to the substantial evidence in the record, and is unsupported by the record.

28. To the ALJ's failure to find that Barrett was under no legal, nor contractual obligation to hire in the same manner as Billy Martin, since this failure ignored applicable law and the substantial and material evidence in the record.

29. To the ALJ's failure to find that the Collective Bargaining Agreement (hereinafter "CBA") (GC-2) between the Cardinals and the union gave the Cardinals (and all employers) the non-mandatory option to access the union's hiring hall when hiring decisions were needed, since this failure ignored the substantial and material evidence in the record.

30. To the ALJ's failure to find that Barrett had no knowledge of the November 2 and November 6, 2017 exchange of correspondence between the Cardinals and James Maxwell, Thomas Maxwell and Eugene Kramer (hereinafter "Kramer") authorizing background checks, in which it was noted that such authorization was necessary because these three individuals would work for the Cardinals in 2018, since this failure ignored the substantial and material evidence in the record.

31. To the ALJ's failure to find that the Cardinals and Joe Bell (hereinafter "Bell") did not exchange correspondence in which any intention was expressed that Bell would work for the Cardinals again in 2018, since this failure ignored the substantial and material evidence in the record.

32. To the ALJ's failure to draw adverse inferences from the General Counsel's failure to recall James Maxwell, Thomas Maxwell, Kramer and Bell to deny allegations and testimony adverse to their interests and the interests of General Counsel.

33. To the conclusion that the Cardinals, by Barrett, unlawfully discriminated against the four Charging Parties (D.6:9-10), since this conclusion is contrary to law.

Much of the ALJD's brief analysis of Respondent's actions with regard to the Charging Parties appears to suggest Barrett was somehow constrained in his first annual hiring decisions by

various considerations. Specifically, the ALJD refers to prior Painting Foreman Billy Martin's hiring practices (D. 2:17-24), the Union hiring hall (D. 6:23-30), and pre-Barrett background check letters indicating an intent to hire James Maxwell, Thomas Maxwell, and Kramer (but not Bell) in 2018 (D. 2:26-29).

In fact, none of these factors, nor any other requirements aside from the legal obligations borne by every employer, constrained Barrett's decision making. Barrett's immediate superior, Maruyama, explained on cross-examination:

> Q: So the Painting Foreman has the authority to hire and fire employees, right?
>
> A: Correct.
>
> Q: Do you -- do you oversee that in any way? Do you verify that the hiring and firing decisions -- are they brought to your attention or is it complete authority and complete responsibility?
>
> A: That is Patrick [Barrett]'s responsibility.
>
> Q: Okay. You -- you have -- you have no role whatsoever in reviewing those decisions?
>
> A: No, I do not.

(Tr. 265).

Barrett himself testified:

> Q: Now, who made the hiring decisions for the 2018 season?
>
> A: I did.
>
> Q: In making those decisions, were you bound in any way by decisions that Billy Martin had made in the past?
>
> A: No, sir.
>
> Q: Is this the first time you've ever hired painters for the Stadium?
>
> A: Yes, sir.

(Tr. 313).

Regarding the letters signed by the Maxwell brothers and Kramer prior to Barrett's hiring (GC-10, 11, 12), he explained:

> Q: Do you recognize those documents (GC-10, 11, 12)?
>
> . . .
>
> A: It is an Annual Criminal Background Check Release Form for -- from the Cardinals.
>
> Q: What is your understanding of the purpose of these documents?
>
> A: To give the Cardinals the okay to run an extensive background check on every employee.
>
> Q: Why do the Cardinals need to do that?
>
> A: Because of our Homeland Security designation.
>
> . . .
>
> Q: Are those documents only given to painters?
>
> A: No, everybody gets one.
>
> Q: When you say "everybody," who(m) do you mean?
>
> A: All of the Cardinals employees.
>
> Q: Did those letters factor into your decision at all regarding who(m) to make offers to in 2018?
>
> A: Oh, no.

(Tr. 331-32).

Finally, the CBA preserves hiring discretion for all signatory employers by requiring only that they hire Union members in good standing. (GC-2, Sec. 7) (Tr. 100). Though the ALJ appears to emphasize the fact that Barrett did not use the hiring hall (D. 4:30-33), other than consulting the out-of-work list, the hall's non-mandatory nature renders such emphasis inappropriate. The CBA did not bind Barrett so long as he hired Union members.

Taken as a whole, the record leaves no doubt that Barrett, as the new Painting Foreman, could hire whomever he felt comfortable hiring into painting jobs for 2018. Barrett's promotion, for the first time in decades, brought a clean slate to the Painting Department at Busch Stadium. As a result, the Board must reject any implication that past practices, background check documents, or the CBA constrained his hiring decisions.

2. Respondent Would Have Taken the Same Actions Regarding Charging Party Thomas Maxwell Absent Any Purportedly Protected Activities Because It Took No Adverse Action Against Him.

Respondent has excepted:

34. To the ALJ's failure to find that Thomas Maxwell suffered no adverse action, since this failure ignored the substantial and material evidence in the record.

35. To the ALJ's failure to find that Barrett's February 5 and 8, 2018 offers of employment to Thomas Maxwell were made nearly contemporaneously with the offers to Ochs and Burns, and consistently with the timing of offers to painters in prior years which was a function of the timing of when the ballpark was scheduled to open for the Cardinals first home game of the season, since this failure ignored the substantial and material evidence in the record.

36. To the conclusion that Barrett's February 5 and 8, 2018 job offers to Thomas Maxwell did not detract from alleged evidence that the Cardinals discriminated against Thomas Maxwell by not offering him employment earlier (D.6:25-30), since this conclusion is contrary to the substantial evidence in the record and is unsupported by the record.

The ALJD's treatment of Thomas Maxwell defies explanation. It asserts only that Barrett should have offered Maxwell work earlier (specifically, at the same time as painters Ochs and Burns). (D. 6:25-30). This assertion is confounding for several reasons.

First, the order in which Barrett called painters to make offers had no bearing whatsoever on anyone's terms and conditions of employment. These January and February calls only scheduled the painters to begin work later on, generally in March, in conjunction with the start of the baseball season. (Tr. 307, 312-13, 317, 376). There is no evidence that, because Barrett called Ochs and Burns first, they also began working first.

Second, as demonstrated *supra*, Barrett called Thomas Maxwell third amongst the eight painters hired in 2018. The ALJD fails to explain how Respondent could have violated the Act based on the timing of its call to Thomas Maxwell, when only *two of seven other painters* received earlier calls. Barrett was under no obligation, to "recall Thomas Maxwell when he recalled Ochs and Burns" (D. 6:29-30), any more than he was obligated to wait to call him at the same later time as the other five painters.

Third, the ALJD points out Barrett "made this offer after the ULP charges were filed in this case. I infer that was his motivation in extending the offer to Thomas Maxwell." (D. 6:27-39). The ALJ does not explain the basis for this inference. More importantly, though, it defies logic to assert that such a motivation would be problematic even assuming *arguendo* its truth. Although Respondent recognizes it is unlawful to *punish* an employee for participation in Board charges, it knows of no authority establishing violations for *declining to take an adverse action* against an employee for participation in Board charges.

In fact, the February 5 and 8, 2018 dates when Barrett called Thomas Maxwell to offer him work were entirely consistent with Respondent's usual practice of offering work to Thomas Maxwell and other painters during the month of February, to commence in the weeks prior to the team's home opener. (Tr. 312-13). In fact, these offers could be considered even *earlier* than usual due to the team's season-opening road trip. (Tr. 312). The General Counsel presented no evidence suggesting that either the offer to Thomas Maxwell, or the time in which he would have commenced work, deviated in any way from Respondent's normal practices. Consequently, Thomas Maxwell suffered no adverse action, and the Board must reverse the ALJD's finding of a violation with regard to him. *Lancaster Fairfield Community Hospital*, 311 NLRB 401, 403-04 (1993).

3. Respondent Would Have Taken the Same Actions Regarding Charging Party James Maxwell Absent Any Purportedly Protected Activities Because Barrett Possessed Legitimate and Unrebutted Concerns about his Willingness to Work for Barrett and about Maxwell's Work Performance.

Respondent has excepted:

37. To the finding that it is unclear exactly what Hosei Maruyama (hereinafter "Maruyama") told Barrett about the conversation in which James Maxwell told Maruyama that he (James Maxwell) could not work for Barrett (D. 3:2-3), since this finding is contrary to the substantial evidence in the record and is unsupported by the record.

38. To the finding that Barrett had difficulty recalling the exact date of the conversation in which Maruyama conveyed to him that James Maxwell could not work for Barrett (D. 3:5-6), since this finding is irrelevant, contrary to the substantial evidence in the record, and is unsupported by the record.

39. To the ALJ's failure to find that: (i) Maruyama conveyed to Barrett that James Maxwell had stated he could not work for Barrett; (ii) James Maxwell subsequently told Maruyama that he would "bite his lip and try to make it work" (TR 258); and (iii) Barrett naturally and logically found James Maxwell's subsequent statement insufficient (TR 325-26).

40. To the finding that there was no evidence that Barrett had made offers of employment to anyone before learning that James Maxwell had told Maruyama that he would "bite his lip and try to make it work", since this finding is incomplete and has no legal or logical relevance.

41. To the ALJ's discrediting Maruyama's explanation (D. 4, fn. 4) that his "actions have consequences" comment referred to James Maxwell's statement that he (James Maxwell) could not work for Barrett, rather than to other actions, since this is contrary to the substantial evidence in the record and is unsupported by the record.

42. To the finding that Maruyama's "actions have consequences" comment implied that the Charging Parties would not be recalled to work (including Thomas Maxwell who was, in fact, recalled to work thereafter) because they had filed internal union charges against Barrett (D. 4:10-13), since this is contrary to the substantial evidence in the record and is unsupported by the record.

43. To the conclusion that Maruyama's "actions have consequences" comment violated Section 8(a)(1) of the Act (D. 5:1-16; 7:20-24), since: those "actions" were not protected by the Act; the ALJ erred in rejecting Maruyama's explanation of this comment (Exception No. 41); the comment did not tend to coerce Thomas Maxwell in the exercise of his Section 7 rights; and the comment, in fact, did not deter Thomas Maxwell or the other three painters in prosecuting internal union charges

against Barret and/or in appealing the fine assessed by the union against Barrett which they thought was insufficient.

44. To the conclusion that Maruyama implicitly told Thomas Maxwell that the internal union charge was "the reason" the Charging Parties would not be offered work for the Cardinals in 2018 (D.6:10-12) since this is contrary to the substantial evidence in the record, and is unsupported by the record.

45. To the ALJ's failure to find that Maruyama played no role in deciding which painters Barrett hired in 2018, since this failure ignored the substantial and material evidence in the record.

46. To the ALJ's failure to find that James Maxwell was, in Barrett's opinion, not a good painter or employee, performed sloppy work, and had unprofessional work habits (including sleeping on the job and returning to work after using marijuana on lunch breaks) (TR 321-24), since this failure ignored the substantial and material evidence in the record.

47. To the ALJ's failure to find that James Maxwell sat through and heard all of the Exception No. 43 evidence, yet he failed to re-take the stand to deny any of this evidence against him, since this failure ignored the substantial and material evidence in the record.

James Maxwell performed sloppy and unprofessional work, slept on the job, returned to work after smoking marijuana on lunch breaks, and informed Respondent he could not work for Barrett. (R-6(a)) (Tr. 321-24). Any one of these considerations, particularly Maxwell's sleeping, drug use, and "adamant" unwillingness to work for Barrett (later only half-heartedly contradicted), would constitute compelling objective reasons for any employer to decline to employ an individual. Importantly, the 2018 season presented Barrett with his **first opportunity to hire**. Consequently, the ALJ could not, and did not, rely upon any assertion that Barrett tolerated such behavior in the past. Even more importantly, all of this misconduct **stands unrebutted** on the record. The General Counsel could have called James Maxwell, who sat through the hearing as the Charging Parties' representative, to ask him whether Barrett's allegations of misconduct were true. It chose not to do so.

The ALJ makes much of a surreptitiously recorded call between James' brother, Thomas, and Maruyama, in which Maruyama explained "actions have consequences." (D. 4:10-13, 5:7-16, 6:9-14). Specifically, the ALJ erroneously concluded, without reference to any context, specific other aspects of the conversation, or other relevant factors, that this statement informed Thomas Maxwell the Charging Parties' internal union charges caused Barrett not to hire them. (D. 4: fn. 4). Initially, it is important to note that Maruyama undisputedly did not act as the decision maker on painter hiring. (Tr. 265, 313).

Additionally, as Maruyama explained on the stand, the "actions" he referred to were James Maxwell's "passionate" and "very adamant" assertion that he could not work for Barrett. (Tr. 256-57, 264, 324-25).[14] Maruyama's explanation makes far more sense in context than the meaning attributed to him by the ALJ. After all, it was Maruyama who personally took James Maxwell's emotional call about his unwillingness to work for Barrett (D. 3:1-2), while the internal union charges did not personally affect Maruyama in any way. James Maxwell's intemperate comments were, as a matter of course, at the forefront of Maruyama's mind.

James Maxwell's strong assertion that he could not work for Barrett warrants additional emphasis. Barrett, for the first time, possessed the opportunity to hire painters. He made these decisions unbound by any past practices. Why, under those circumstances, would he choose to hire someone who so forcefully volunteered concerns about his ability to work for Barrett? As the ALJ failed to find, James Maxwell's half-hearted attempt to retract the statement, saying he would "bite his lip" and try to work with Barrett, naturally did little to blunt the impact of his initial

[14] The ALJ correspondingly found Maruyama's statement violated Section 8(a)(1) of the Act. (D. 5:7-16). Even putting aside the statement's clear reference to James Maxwell's professed unwillingness to work for Barrett, this finding must be reversed because the internal union charges were unprotected. *Correctional Medical Services*, 349 NLRB 1198, 1203 (2007) (dismissing Section 8(a)(1) statement allegations because the conduct referred to in the statements lacked protection).

assertions. (Tr. 257-58, 325). Factoring in James Maxwell's uncontroverted sloppy work, tendency to shirk (or even sleep) on the job, and workplace marijuana use, Barrett's decision not to offer him work stands as a common sense decision, separate and apart from any animus against the internal union charges. These considerations form the foundation of a classic *Wright Line* rebuttal defense. Had the ALJ not cavalierly attempted to overrule the *Wright Line* defense, the conclusion that Respondent would have taken the same actions with regard to James Maxwell, even absent any purported unlawful animus, would have been inescapable.

4. Respondent Would Have Taken the Same Actions Regarding Charging Party Eugene Kramer Absent Any Purportedly Protected Activities Because Barrett Possessed Legitimate and Unrebutted Concerns about Kramer's Work Performance.

Respondent has excepted:

> 48. To the ALJ's failure to find that Kramer was, in Barrett's opinion, an inferior painter and employee given Kramer's poor work history and use of marijuana on lunch breaks (TR 295-96, 326-27), since this failure ignored the substantial and material evidence in the record.
>
> 49. To the ALJ's failure to find that Kramer failed to re-take the stand to deny the Exception No. 48 evidence against him, since this failure ignored the substantial and material evidence in the record.
>
> 50. To the ALJ's failure to explain his conclusion that Barrett's reasons for not offering employment to Kramer and James Maxwell were pretextual (D.6:12-13), since this failure ignored the substantial and material evidence in the record.

Eugene Kramer also performed poor work and smoked marijuana on lunch breaks. (Tr. 295-96, 326-27). Barrett possessed first-hand experience about the consequences of Kramer's poor work, not only at Busch Stadium, but also for Shamel Construction. Furthermore, the evidence of Kramer's shoddy work is not only unrebutted; it is also corroborated. Neutral third-party witness Bob Shamel confirmed the deficiencies in Kramer's work, and even added that his sloppiness resulted in a need to refinish the floors at a building. (Tr. 250-51). Again, separate and apart from the internal union charges, why would Barrett use his first hiring opportunity, and his

virtually unbounded discretion, to hire someone whom he had personally witnessed performing substandard work (and smoking marijuana on lunch breaks) on many occasions? No rational actor would do so. Consequently, Respondent's *Wright Line* rebuttal stands just as strongly with regard to Kramer as it does for James Maxwell.

Additionally, the Board need not speculate about what Respondent would have done regarding James Maxwell or Eugene Kramer (or, for that matter, Joe Bell) in a hypothetical scenario in which they did not pursue internal union charges. Instead, the distinction between them and Thomas Maxwell, to whom Barrett did offer work, conclusively demonstrates the validity of Respondent's *Wright Line* rebuttal defense. Barrett explained, without contradiction, that he offered work to Thomas Maxwell because he, unlike James Maxwell and Eugene Kramer, is "a good painter." (Tr. 321). Additionally, unlike Bell, Barrett understood Thomas Maxwell to be available for work. (Tr. 327). The ***only*** difference between Thomas Maxwell on one hand, and James Maxwell, Kramer, and Bell on the other, is Barrett viewed Thomas Maxwell's work favorably and believed him available. All four Charging Parties participated to the same degree in the internal union charges. The quality of their work and their availabilities served as the distinguishing factors in Barrett's mind. This uncontradicted evidence compels the conclusion that Respondent would have made the same decisions with regard to James Maxwell, Kramer, and Bell absent any purportedly unlawful animus.

5. <u>Respondent Would Have Taken the Same Actions Regarding Charging Party Joe Bell Absent Any Purportedly Protected Activities Because Barrett Undisputedly Knew That Bell Was Already Then-Employed at Busch Stadium with One of the Cardinals' Painting Contractors in Bell's Preferred Specialty Line of Work.</u>

Respondent has excepted:

> 51. To the ALJ's failure to find that to Barrett's knowledge, Bell was a steel painter, not accustomed to the type of detailed painting needed to be done by the Cardinals (TR 131, 298), that Bell was already working at the Stadium in the 2018 offseason

for a painting contractor of the Cardinals (TR 132, 327-28), all of which made it illogical for Barret to offer work to Bell in 2018, since this failure ignored the substantial and material evidence in the record.

52. To the conclusion that Barrett's explanation for not offering employment to Joe Bell is obviously pretextual (D.6:15) since this conclusion is contrary to the substantial evidence in the record and is unsupported by the record.

53. To the finding that, if a painter was offered seasonal work by the Cardinals while employed elsewhere that he/she would leave the other job to accept the Cardinals' offer (D. 2:22-24), since this finding is contrary to the substantial evidence in the record and is unsupported by the record.

54. To the conclusion that Barrett did not know whether the painters to whom he had offered employment were working at the time of his offers and that Barrett knew that in the past seasonal painters obtained releases from their employers to perform seasonal work for the Cardinals (D. 6:16-19), since this conclusion is contrary to the substantial evidence in the record and is unsupported by the record.

55. To the finding that neither Mark Ochs (hereinafter "Ochs") nor Mickey Burns (hereinafter "Burns") were hired via the union's hiring hall (D. 4:30-31), since this is contrary to the substantial evidence in the record and is unsupported by the record.

56. To the finding that Duane Oehman was the only painter hired through the union's hiring hall (D. 4:32-33), since this finding is contrary to the substantial evidence in the record, and is unsupported by the record.

57. To the ALJ's failure to find that, prior to offering employment to Ochs and Burns, Barrett consulted the union hiring hall's out of work list (RX-11) and learned they were not working, since this failure ignored the substantial and material evidence in the record.

58. To the ALJ's conclusion that Barrett's reasons for not offering Bell 2018 work were incredible (D. 3, fn. 2), since this conclusion is contrary to the substantial evidence in the record, and is unsupported by the record.

59. To the ALJ's failure to find that Bell failed to re-take the stand to deny any of this evidence against him, since this failure ignored the substantial and material evidence in the record.

60. To the ALJ's failure to conclude, assuming *arguendo* the Charging Parties engaged in conduct protected by the Act, that the Cardinals would have made the same decision on the timing of the job offer to Thomas Maxwell, and would have made the same decision not to make job offers to James Maxwell, Kramer and Bell, since

> the failure to so conclude is contrary to law and contrary to the substantial evidence in the record.

The ALJ defies logic by sidestepping the clear fact that Barrett knows that Joe Bell was already employed at the Stadium with one of the Cardinals' painting contractors when Barrett made his 2018 offers. The ALJD appears to incompletely to assert that: (1) the union's hiring hall list should have played some other, unspecified role in Barrett's decisions (D. 4:30-33); (2) Barrett did not know whether the individuals he did hire were working (D. 6:16-19); and (3) Barrett should have made offers to painters already working because painters historically leave other jobs to work for Respondent (*Id*.). None of these justifications withstand scrutiny.

First, as discussed *supra*, the hiring hall list did not bind Barrett in any way. Barrett only used it as a tool to inform him of painters' likely availability. (Tr. 314). Second, the record contains detailed testimony explaining that, in most cases, Barrett *did* have some knowledge of the availability of the painters he hired. (Tr. 318-21). Furthermore, the ALJ's assertion in this regard ignores the clear distinction between a *belief* that other individuals were or were not employed on one hand, and *affirmative knowledge* through Barrett's personal observation of Bell working at the Stadium on the other. Third, the ALJ's assertion regarding painters leaving other jobs is unmoored to either the record or logic. The only support in the record for the assertion that painters routinely leave other jobs to work for Respondent is testimony by the Maxwell brothers and Bell that they personally had done so in the past. (Tr. 25, 119, 191). Their testimony did not extend to other painters. Furthermore, in February 2018, Thomas Maxwell did not respond to offers to work for Respondent when he had another job. (Tr. 202-03).

This point also fails because the ALJ failed to explain why the willingness of painters to leave other jobs for Respondent means Respondent should always take advantage of that fact. That issue bears particular importance with regard to Bell's circumstances here. Barrett's job is to

oversee the aesthetic qualities of the Stadium with regard to painting. (Tr. 279). Bell is a steel painter by trade, and performs approximately **90 percent** of his work in that capacity. (Tr. 131). Steel painting differs from the painting performed by Barrett's crew because steel painters must often climb to work at heights, the work involves different materials, creates more dirt, and is less detail-oriented. (Tr. 298). Since Bell appeared to be employed for the Cardinals' painting contractor at the Stadium in his normal line of work when Barrett made offers, it would have made little sense to offer him a job performing work for which he possesses less expertise. In fact, due to Barrett's overall responsibilities for the painted aesthetics of Busch Stadium, the only sensible choice was to allow an experienced steel painter to continue painting the Stadium's steel structures. Offering him another type of painting work would have been tantamount to robbing Peter of a dollar to pay Paul 75 cents.

The ALJD's rejection of Respondent's *Wright Line* rebuttal defense suggests that, in the absence of any purportedly unlawful animus, Barrett would have taken the illogical step of offering regular painting work to a steel painter who was already painting steel at the Stadium. None of the ALJ's incomplete attacks on Barrett's knowledge of Bell's employment alter this fundamental fact. As a result, Respondent's *Wright Line* rebuttal defense applies just as strongly to Bell's lack of availability as it does to the factors determining Respondent's actions regarding the Maxwell brothers and Kramer.

C. The Unlawful Objects of the Charging Parties' Internal Union Charges and Respondent's *Wright Line* Rebuttal Defense Each Independently Defeat the General Counsel's Allegations

Respondent has excepted:

> 61. To the ALJ's conclusion that the Cardinals violated Sections 8(a)(1) and (3) of the Act by not offering the Charging Parties employment in 2018 (D. 5:18-19) since: (i) the Charging Parties' activities were not protected by the Act, and, hence General Counsel failed to submit a prima facie case of violation of Sections 8(a)(1)

and (3) of the Act; (ii) the Cardinals carried their burden of proving that the same decisions re offers of employment would have been made, even if any of the Charginng had engaged in activities protected by the Act; and (iii) the Cardinals did offer employment to Thomas Maxwell, a fact found by the ALJ (D. 4:35-37).

62. To the conclusion that the Cardinals violated Sections 8(a)(1) and (3) of the Act via the timing of the job offer to Thomas Maxwell and via the failure to recall or rehire James Maxwell, Kramer and Bell in 2018 (D. 7:16-18), since these conclusions are contrary to law and unsupported by the record.

63. To the ALJ's failure to recommend dismissal of the Complaint, as amended, in its entirety, since the failure to so recommend is contrary to law and contrary to the substantial evidence in the record.

As explained *supra*, the ALJ erroneously found merit to the General Counsel's allegations for two reasons: (1) the Charging Parties' internal union charges were unprotected because they filed and pursued the charges with the object of causing the Union to violate Section 8(b)(1)(B) of the Act; and (2) Respondent would have taken the same actions with regard to each Charging Party even absent any purportedly protected activities. Therefore, the Board should reverse the ALJ's findings of violations, and dismiss the Complaint in its entirety.

D. The ALJD Contains Additional Erroneous Factual Findings

Respondent has excepted:

64. To the ALJ's repeated misidentification of James Maxwell as "Joseph" or "Joe" Maxwell (D. *passim*) since this is contrary to the substantial evidence in the record.

65. To the finding that former foreman Billy Martin was one of two full time painters employed by the Cardinals and that, since 2010, James Maxwell was the other full time painter (D. 2:12-13) since this is contrary to the substantial evidence in the record and is unsupported by the record.

66. To the ALJ's crediting of James Maxwell and inferentially discrediting Patrick Barrett (D. 2, fn. 1) that James Maxwell had never worked full time for the Cardinals, since this is contrary to the substantial evidence in the record and is unsupported by the record.

As Respondent anticipates the General Counsel will agree, the ALJ misidentified James Maxwell as "Joseph" or "Joe" Maxwell. The Board should correct this error for clarity in future proceedings.

As the ALJD notes, the issue of whether James Maxwell worked as a "full-time" painter for Respondent in the past generally "would only be relevant in a compliance proceeding." (D. 2: fn.1). Additionally, Maxwell's false assertion that he worked as a "full-time" painter also weighs against his credibility. In any event, the Board should correct the ALJ's apparent acceptance of Maxwell's assertion. The record contains ample and detailed evidence that Respondent employs on one full-time painter – the Painting Foreman – and that all full-time employees of Respondent receive many benefits that James Maxwell never received. (Tr. 281-82). Consequently, James Maxwell's attempt to elevate his status illustrates the untruthful nature of his testimony overall, and that assertion should not be viewed as accurate moving forward.

E. The ALJD Erroneously Issued a Recommended Order and Remedies

Respondent has excepted:

67. To the issuance of any Remedy (D.7:25 to D. 8:22) since any Remedy is contrary to law and contrary to the substantial evidence in the record, and is unsupported by the record.

68. To the issuance of any recommended Order (D. 8:24 to D. 10:8)) since any Order is contrary to law and contrary to the substantial evidence in the record, and is unsupported by the record.

69. To the ALJ's proposed remedy that Respondent compensate Thomas Maxwell, James Maxwell, Eugene Kramer, and Joe Bell for any adverse tax consequence of receiving a lump-sum backpay award as prescribed in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), because this remedy exceeds the Board's remedial authority. (D. 8:16-19).

70. To the ALJ's proposed remedy that Respondent compensate Thomas Maxwell, James Maxwell, Eugene Kramer, and Joe Bell employee due backpay with interest compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010), enf. denied on other grounds sub. nom., *Jackson Hospital Corp. v. NLRB*,

647 F.3d 1137 (D.C. Cir. 2011), because this remedy exceeds the Board's remedial authority. (D. 8:1-13).

71. Respondent excepts to the ALJ's proposed remedy that Respondent compensate the Charging Parties for search-for-work and interim employment expenses (D. 9:19-21) because search-for-work and interim employment expenses are a normal and routine aspect of employment in this industry, and this remedy exceeds the Board's remedial authority if such expenses exceed interim earnings.

As explained *supra*, Respondent did not violate the Act in any manner. Consequently, the ALJ erred in issuing an Order and finding remedies appropriate. Additionally, the ALJ also erred in ordering remedies consistent with *AdvoServ* and *Kentucky River* because such remedies exceed the Board's remedial authority.

The Board's authority to grant relief is limited to remedial relief. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11-12 (1940) citing *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 235-36 (1938); *NLRB v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 267-68 (1938). It is not authorized to require punitive relief. *Consolidated Edison*, 305 U.S. at 235-36.

The ALJ's proposal that Respondent compensate employees for "adverse tax consequence[s] of receiving a lump-sum backpay award" encroaches upon punitive grounds. The objective of backpay is to replace wages the employee lost. Once an employer has made such a replacement, its obligation is satisfied. The Act lends no support to the *AdvoServ* theory that an offending employer "caused" adverse tax consequences. Such an employer exercises no control over the Internal Revenue Code. Furthermore, in compliance proceedings, an employee concerned about tax consequences may negotiate an installment payment plan if he or she finds such a plan advantageous. As a result, the ALJ's proposal that Respondent compensate employees for adverse tax consequences must be reversed.

The requirement that interest on backpay be compounded daily under *Kentucky River* further exceeds the Board's remedial authority. Daily interest compounding is unavailable in most

private investments. Consequently, the *Kentucky River* standard causes backpay to grow far faster than it would grow if employees had never lost the earnings, thus creating a punitive result for employers. The Board should therefore reverse *Kentucky River*, and the ALJ's proposed daily compounding of interest.

Similarly, Respondent should not be compelled to compensate the Charging Parties for search-for-work and interim employment expenses. Painters in the industry perform seasonal, short-term work. (D. 2:9-15). Consequently, search for work and interim employment expenses would have been incurred by the Charging Parties regardless of Respondent's 2018 hiring decisions. Search for work expenses would thus provide a windfall to the Charging Parties.

A windfall may also result if, under *King Soopers, Inc.*, 364 NLRB No. 93 (2016), the Board required compensation for search for work expenses, even if such expenses exceed interim earnings. As former Chairman Miscimarra explained in dissent to that decision (slip op. at **9-16), the *King Soopers* approach produces a windfall in certain cases, creates a substantial risk of protracted litigation, and is inconsistent with the practices of other agencies under other employment statutes. As a result, the Board should overrule *King Soopers* and reverse this aspect of the ALJ's proposed remedies.

IV. CONCLUSION

The record evidence reflects that the General Counsel did not satisfy its burden to show that Respondent violated the Act, and thus its allegations must fail. As Respondent's Exceptions reveal, the ALJ made numerous errors in concluding to the contrary. For these and all of the reasons discussed above, Respondent's Exceptions should be granted, the findings and conclusions of the ALJ to which Respondent has excepted should be overturned, the Board should conclude

that no violations of the Act occurred, and the Amended Complaint should be dismissed in its entirety with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of November, 2018 I filed the foregoing RESPONDENT'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION via the National Labor Relations Board's E-File system and served via Federal Express to the following parties:

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